

Retail and Restaurant Leasing
What New Attorneys Need to Know....

Tips and (grease) Traps

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NOTE: These materials are based on materials prepared by the author in connection with a presentation at the ICSC (International Council of Shopping Centers) Law Conference, Phoenix, AZ, October, 2015.

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Basic Matrix Overview

Type of Premises/tenant	Retail-dry	Retail-dry major	Retail-dry Mom- and-pop	Rest. National	Rest. Destination	Rest. local
Shopping center—mall						
Shopping center—mall—food court						
Shopping center-strip						
Shopping center--out parcel (pad site)						
Shopping center out parcel—big box tenant						
Urban—hi-rise office/residential						
Urban—low rise office/residential						
+landmark status issues						

Type of restaurants/ cuisines	Sit-down white table cloth-Fine dining	Popular priced—Family Dining	Café-Bistro-Pub-Coffee House	Fast food	Buffet-Cafeteria	Ethnic	Fast Casual	Food Court-Food Hall	Snack bar	Pop-up	Food Truck
French, Italian Chinese, etc											

A Basic Guide to Special Lease Provisions

LL= Landlord T = Tenant Ts = SC Tenants SC= Shopping Center

Issue	LL Point of View	T Point of View	Typical compromises/notes
Lease Commencement Date Fixturing & Permitting Period Rent Commencement Date “Drop dead” date		Need lead time to do work, coordinate construction—inventory—staffing—opening promotion and advertising considerations	Opening conditions <ul style="list-style-type: none"> • satisfaction of co-tenancy requirements • grand opening (all stores to open simultaneously) considerations • T: black-out dates (don’t want to open off season, or with insufficient time to max seasonal sales) • “drop dead” date if L cannot deliver premises, as required, by a date certain, T can cancel.

Issue	LL Point of View	T Point of View	Typical compromises/notes
Fixed Rent			When does rent commence? <ul style="list-style-type: none"> • Conditions precedent: LL has completed LL’s work, T work completed • free rent periods • co-tenancy requirements
Percentage rent—“gross sales” defined	Broad definition of gross sales, on and off premises	Limit—add exceptions and exclusions	Shopping centers context T pays a % of sales above a certain amount (called the “break-point”) calculation of “natural” break-point: divide fixed rent by an agreed %, T then pays that % of sales above the breakpoint \$ amount <ul style="list-style-type: none"> • Example: base rent = \$100,000 % = 3% “natural breakpoint is \$100,000 divided by 3% = \$3,333,333 so T will pay 3% of gross sales above \$3,333,333 typical % rents: retail 3-6% food court 8-10% fine dining 6-8% theater: 12-15% exclusions <ul style="list-style-type: none"> • wide ranging list: comps (customer returns), credit card fees, taxes, refunds and similar

Issue	LL Point of View	T Point of View	Typical compromises/notes
			See Sample Tenant Rider A, ATTACHED
Use	Limit –highly define—draft with specificity “...and for no other purpose”	Open-flexible-allow for evolution of concept-change	Common law principle allows T to do anything it wants, provided legal <ul style="list-style-type: none"> • lease language must define and restrict this common law right • provide for evolution of T’s retail or rest. concept—ancillary (incidental) uses such as sale of merchandise • also, allow for later flexibility if T seeks to assign/sublet • allow T to operate “substantially as other T stores are operating from time to time”
Exclusives (T will have the exclusive right to sell certain lines and or items, in the SC)	Resists	Insist	Focus on categories, rather than specific products <ul style="list-style-type: none"> • note issue of what land is burdened by the exclusive: entire shopping center? Adjacent land owned by same or related entities • Practice Pointer: cover portions of the property that may be later sold by LL, add provision re covenants in deed acknowledging exclusive or record memorandum of lease
Continuous Operations (mandatory days and hours that T is required to be open, fully stocked and operating its premises)	T must operate, not simply pay rent and go dark—a “dark” store diminishes foot traffic in the mall and is bad PR—also means no % rent—try to keep all the Ts in line	Major T: will not agree to a continuous operation clause	Relates to other clauses such as exclusives granted to T <ul style="list-style-type: none"> • if T not operating , then T should not have benefit of the exclusive • right to “go dark” under certain circumstances—see below

Issue	LL Point of View	T Point of View	Typical compromises/notes
<p>Go-dark (T has right to stop operating under defined circumstances)</p>	<p>No</p>	<p>Yes</p>	<p>If co-tenancy covenants are not being met , or location is not working for T: go dark—or continue operating and pay % rent only</p> <ul style="list-style-type: none"> • tie in with assignment and subletting and % rent (clearly if T not operating, LL receives no % rent) • right to close (go dark) for repairs, renovations, inventory (not deemed to violate use or continuous operation clauses)
<p>Kick-out (T has right to terminate lease under defined circumstances)</p>	<p>No</p>	<p>Need if biz is failing</p>	<p>Use measurable parameters such as % decrease in sales</p> <ul style="list-style-type: none"> • if T rolls out many stores in street locations, T may want to cherry pick as to which underperforming stores to close (e.g. a Starbucks that saturates an urban commercial district)
<p>Co-tenancy (T’s obligations are subject to the opening/ operating of other Ts in the SC)</p>	<p>Resist Landlord will say no penalty for co-tenancy “default” as in “don’t blame me, I’m trying my best to keep this Center fully leased. If there’s a closing, it’s not my fault.”</p>	<p>Needed to assure flow of customers—also relate to opening requirements T: I need anchor X to be open and operating, or a remedy if less than a specified % of in line Ts are open and operating</p>	<p>LL may also insist on a sales % decline test, with T getting relief only if it can objectively establish a loss</p> <ul style="list-style-type: none"> • allow T to pay % rent only

Issue	LL Point of View	T Point of View	Typical compromises/notes
<p>Radius restrictions</p> <p>(T is prohibited from operating other stores within a defined geographic area)</p>	<p>Yes—limit competing venues</p>	<p>Resist--</p>	<p>Involves uses which are “similar or competing” with proposed T use</p> <ul style="list-style-type: none"> • Narrow geographically • limit to the shopping center or a few miles • more important where you have a destination restaurant (rare in urban leasing setting)
<p>CAM charges</p> <p>(reimbursement to LL of “expenses” incurred in Common Area Maintenance)</p>	<p>Broadly defined “any and all costs and expenses of any kind incurred by LL in connection with the management and operation of the SC’s ‘common areas’ ”</p> <p>--as to audits limit time frame, scope</p> <p>--also disqualify any auditor whose fee are on a contingent basis</p>	<p>Important carve-outs</p> <p>T: carve out capital costs</p> <p>T: audit rights as to LL’s books and records</p> <p>L to pay cost of T’s audit if discrepancy of x% or more</p>	<p>Try to avoid certain overreaching by LL</p> <p>Examples</p> <ul style="list-style-type: none"> • leasing agent’s office party and entertaining prospective Ts! <p>Definition of “pro-rata” share</p> <ul style="list-style-type: none"> • GLA of T space over GLA of entire shopping center • Use “leaseable” not “leased” as denominator • circumscribe what is included in the “common areas” • T: deduct: repairs under warranty, work, brokerage, legal fees, incurred for other T spaces • Also deduct leasing costs, lease enforcement costs, cost of new buildings and costs reimbursed by insurance <p>See Sample Tenant Rider B, ATTACHED</p>

Issue	LL Point of View	T Point of View	Typical compromises/notes
Signage	LL wants approval rights	Vital to T's visibility	Get LL approval in advance of lease signing <ul style="list-style-type: none"> • make sure signage rights are assignable to transferee
Access			LL to conduct repairs etc during non-business hours
Alterations			No LL consent required for non-structural repairs— try for a certain \$ amount that will not require LL consent--& amount should increase per CPI to account for inflation
Promotional Fund (SC Ts contribute to fund for seasonal and state holiday promotions)		Already spending substantial sums in its own advertising, marketing and promotion programs	Limit to proven marketing and advertising programs <ul style="list-style-type: none"> • try for an annual cap
Trade name	T must operate under Trade name	Right to change if changing name of other stores in chain	Provide for right to use different name esp if lease is assigned or there is a sublet
Option to renew			Better to have a five year term with two options <ul style="list-style-type: none"> • some insurance if business is failing • if the lease has a shell corp. T, then T will want to max. years on initial term and option
Good Guy Guaranty	Wide-open	Limit	Limit to payment, not performance

Special considerations—applicable to Restaurant Leasing

Issue	LL POV	T POV	Typical compromises/notes
Description of premises			Legal descriptions, esp in a multilevel complex must be carefully thought out <ul style="list-style-type: none"> • Use diagrams (3D can be helpful) • Detail basement space for example • Are patios included? Impact on rent/sales—also check zoning codes as to permitted outdoor area seating permits • roof as to signage, satellite and cable TV installations • exterior walls as to advertising signage • define exactly what’s included
Use	Type of restaurant— menu limits-- liquor as limited % of sales tie Rest use to items on menu attached as an exhibit to lease	Try to be descriptive, rather than specific— types of food rather than specific menu items flexibility	
Use--zoning-liquor license	In Manhattan, for example, LL: no contingency for liquor license unless inherent problem with the premises/building		Esp. as to premises being “licensable” for liquor, beer, wine sales <ul style="list-style-type: none"> • the key to Rest. profitability • ties in with numerous other clauses esp. rent commencement date (very costly to be required to operate without liquor license in place)

Issue	LL POV	T POV	Typical compromises/notes
Use—incidental purposes	limit	flexibility	Sale of merchandise <ul style="list-style-type: none"> • ancillary sales of novelties and wearables
Exclusive			SC can only support so many pizza parlors and taco stands (distinguish from retail clothiers)
Rent Commencement Date Permitting Period	Rent starts at some earliest possible date (x days after Landlord has completed any LL's work, for example)	No rent unless Rest. is fully operational-including liquor license avoid fixed dates need to cover contingencies	Sliding date to account for domino effect of certain key tenants not opening and consequences thereof <ul style="list-style-type: none"> • with long Rest. construction schedules, free rent period will end prior to completion of construction Urban LLs may not give liquor license contingency clause
Initial Construction Alterations			Much more extensive for a restaurant than a retail T <ul style="list-style-type: none"> • many more issues • greater investment/lead time • special issues where space is in a landmarked building
Lease Commencement Date— Fixturing permitting period Rent Commencement Date	If urban/street location: all on T's shoulders		Construction issues <ul style="list-style-type: none"> • possibility of LL delay • time for T to obtain licenses required • also co-tenancy opening /rent commencement date issues • a restaurant lease might provide no required opening until adjacent movie theater has opened
Utilities Electric Sewer		Host of special issues for Rest. T	In shopping center context <ul style="list-style-type: none"> • LL usually provides • investigate adequacy (engineer can develop

Issue	LL POV	T POV	Typical compromises/notes
Water Gas sprinkler			<p>specs as to min capacity required for restaurant’s operations; also architect can perform field inspection to determine exactly what capacity/availability exists)</p> <ul style="list-style-type: none"> • location, availability, quantity • separate meters preferable • Venting—getting to the roof • can be major headache/expense, esp in multilevel SC or hi rise
Trade fixtures	All become LL’s property	<p>Valuable improvements</p> <p>paid for by T</p> <p>T should have right to sell or remove</p>	<p>Define broadly, include all kitchen equipment</p> <ul style="list-style-type: none"> • note no LL’s lien in NY, but contra other jurisdictions • provide for right of T to finance trade fixtures, with LL to cooperate with financing arrangement
Signage			<p>Restaurant signage on wall of SC</p> <ul style="list-style-type: none"> • pylon type signs • make sure rights are transferable
Assignment/sublet	Limit consent	Flexible on consent	<p>Typically: consent not to be unreasonably withheld or delayed, with numerous LL carve outs limiting T’s ability to transfer</p> <ul style="list-style-type: none"> • at minimum, make sure right to assign/sublet in connection with mergers, acquisitions, affiliated entities or to franchisee without LL’s consent—also provide LL to agree to give franchisor notice of default, etc. • in urban leasing scenario, the more desirable the location, the more LL has the negotiating edge

Issue	LL POV	T POV	Typical compromises/notes
			SEE detailed discussion in accompanying article, “The Savvy Restaurant Lawyer...”
Continuous operation-special operating hours		Special hours need flexibility -no breakfast or a 24 hour restaurant if multistore chain, T wants all to have same days and hours of operation	If multi-store chain—T wants to make sure LL agrees to keep parking areas lit during restaurant’s special hours—also adjacent common areas
Trash removal			Main issue is storage pending removal (location of storage facility) <ul style="list-style-type: none"> • proper containerization of wet trash, etc. • refrigerated garbage storage to stop odors
Odors/venting	Major issue for urban (hi-rise commercial building) LL		Venting <ul style="list-style-type: none"> • getting to the roof • can be major headache/expense, esp in multilevel SC or hi rise
Grease traps/waterproof floor membranes	Yes	Yes	Specs as to installation and cleaning

Issue	LL POV	T POV	Typical compromises/notes
Ingress/egress/deliveries	<p>Concern about appearances</p> <p>esp in a hi end mall, or office building—</p> <p>unsightly to have food deliveries/removal –</p> <p>esthetics--</p>	<p>Frequent, daily, odd hours</p> <p>don't restrict timing/frequency</p>	<p>Different rules for Rest. with street level access and for Rest. with access only from interior of building</p>
Alterations		Liberal	<p>In light of potential concept change—min consent not to be unreasonably withheld or delayed</p>
Ownership of improvements	Becomes LL's property upon installation	T retains ownership	<p>T will need to retain ownership if it hopes to sell rest business</p> <ul style="list-style-type: none"> • make sure trade fixtures are clearly carved out
Co-tenancy			<p>As to Anchors</p> <ul style="list-style-type: none"> • Open? • What if an anchor closes? As to % of other in line Ts—need min % of same open and operating • Some special emphasis for restaurant T where, for example, having movie theater open and operating is essential to T's biz • if co-tenancy criteria not met, T remedies: convert over to % rent only-- go dark-- terminate lease

Issue	LL POV	T POV	Typical compromises/notes
Parking		In free standing suburban location (pad), need rep from LL that parking allocations meet municipal codes	Never too much <ul style="list-style-type: none"> • successful restaurant is a parking hog • typical SC ratios are inadequate and there will be spill-over parking issues to deal with, for ex. after-regular mall hours lighting issues
Insurance	T to cover any increase in premiums due to its occupancy	Rest. is special—acknowledge that	Typically a live kitchen operation presents an increased risk of fire and water hazards
Radius			Really necessary? Typically only needed if Rest. is a “destination” Rest. —who cares if another Chick-Fil-A opens in the food court in a nearby SC
Roof rights			Starbucks et al providing wi-fi <ul style="list-style-type: none"> • rest Ts, esp sports bar concept, need TV antenna/dish on roof
End of term			Bar, vents, hoods, partitions,etc. major installations—bottom line: it’s very expensive to remove everything including the kitchen sink

Should you wish to discuss any of the above—or anything else of interest--feel free to call.

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Thanks for attending the seminar, and Good Luck!

SAMPLE Tenant Riders

A. Gross sales

There shall be excluded from “gross sales”

1. intercompany transfers of merchandise
2. miscellaneous sales such as cigarettes, candy
3. returns to shippers or manufacturers
4. sales of trade fixtures which are not a part of Tenant's stock-in-trade and not sold in the regular course of Tenant's business
5. cash or credit refunds or credit sales not collected, on transactions included in Gross Sales previously reported by Tenant, but not exceeding the selling price of merchandise returned by or credited to the purchaser and accepted by Tenant
6. the amount of any City, County, State or Federal sales tax, luxury tax, or excise tax on sales, if the tax is added to the selling price and separately stated and actually paid to the taxing authority by Tenant, provided, however, that no franchise or capital stock tax and no income or similar tax based upon income, profits, or Gross Sales as such shall be deducted from Gross Sales in any event
7. uncollectible accounts, but if later collected, said accounts shall be included in Gross Sales
8. meals served to employees
9. meals provided by way of promotions
10. the costs to Tenant for the use of credit cards
11. cigar, cigarette, tobacco, candy, gum or other miscellaneous sales and/or sales from vending or service machines
12. (for restaurants) sales from apparel
13. (for restaurants) proceeds from video or similar games

B. Common Area Maintenance--CAM Exclusions

The following shall not be included in the calculation of common area maintenance (CAM):

1. Costs attributable to repair or replacement of items under warranty
2. Costs of alterations, decorations and the like performed in individuals tenant's spaces
3. Cost of any new buildings
4. Cost of removal or remediation of hazardous substances
5. Cost of repair for which landlord is reimbursed by insurance
6. Reserves
7. Any item of repair or replacement which by standard accounting practice is required to be capitalized
8. Any expense for which landlord receives condemnation proceeds
9. Structural repairs of roof and others
10. Mortgage principal and interest payments.
11. Financing costs
12. Ground rent and related costs
13. Costs reimbursed by tenants
14. Costs reimbursed by insurance
15. Costs reimbursed by government authorities such as in the case of condemnation
16. Special services billed to specific tenants.
17. Legal fees related to leasing or enforcing other tenant's leases
18. Artwork in, or on any part of, the building
19. Off-site management personnel and overhead
20. Operation of any services or amenities for which landlord collects a fee or charge
21. Any remedy of construction defects
22. Costs incurred in leasing tenants' space and retaining existing tenants, including brokerage commissions
23. Fines or penalties incurred due to violations by landlord of any governmental laws and regulations
24. Costs incurred due to violations by landlord of any of the terms of any leases or other agreements affecting the shopping center
25. Salary and benefits of personnel above level of shopping center manager
26. Management fees in excess of three percent of gross receipts
27. Depreciation and amortization of the entire building and any equipment used in connection therewith
28. Cost of complying with government regulations, including, but not limited to, any environmental mandates, e.g., costs of correcting any code violations existing as of the date of lease
29. Interest or penalties resulting from late payments by landlord
30. Advertising costs

31. Brokerage leasing commissions
32. Tenant alterations and alterations made to leasable space
33. Capital improvements other than those primarily for the purpose of reducing operating costs